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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1194~~. 704 ~~765~~ 121

P. PEARL MULLETT, ADMINISTRATRIX OF ALFRED B. MULLETT, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 18, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1194.

P. PEARL MULLETT, ADMINISTRATRIX OF ALFRED B. MULLETT, DECEASED, APPELLANT,

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APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition filed May 4, 1889	1	1
Traverse filed May 17, 1889	7	4
Special plea to first count in petition, filed by defendants January 8, 1890	8	4
Special plea to second count in petition, filed by defendants January 8, 1890	9	5
Motion of claimant to amend petition and allowance of same, January 9, 1890	10	5
Argument and submission of case, April 2, 1890	11	6
Findings of fact and conclusion of law, filed June 2, 1890	12	6
Opinion of the court	14	8
Judgment of the court	16	10
Application for and allowance of appeal	17	10
Certificate	18	10

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 19, 1890.

1 In the Court of Claims. Term 1889–1890.

ALFRED B. MULLETT
v.
THE UNITED STATES. } No. 16622.

I.—*Petition. Filed May* 4, 1889.

To the honorable the judges of the Court of Claims:

1st. The petitioner states that he is a citizen of the United States and that he resides in the city of Washington, District of Columbia; that he is by profession an architect and civil engineer.

That in his professional capacity as an architect he was, in the year 1871, employed by the Secretary of State, Secretary of War, and Secretary of the Navy, a commission created by authority of Congress (16 Statutes at Large, p. 494), to submit designs for the proposed new building for the State, War, and Navy Departments, and that accordingly the claimant prepared such designs, which were accepted by the commission aforesaid.

Thereupon the aforesaid commission directed your petitioner to prepare working drawings for the construction of the said building; which drawings were accordingly prepared by your petitioner and accepted by the aforesaid commission, and which were thereafter followed throughout in the construction of said building.

2 The claimant was also, by the direction of the said commission, charged with the superintendence of the erection of the aforesaid building, and that service was performed by him from about January 1, 1870, until January 1, 1875.

The petitioner claims a commission of one per cent. (1%) for making the preliminary studies and designs, payable on the total cost of the building, which was $10,030,023.99; and also a commission of one and one-half per cent. ($1\frac{1}{2}$%) on the amount of money expended by him as superintendent, which expenditures amounted to $3,876,096.47.

(2.) And the claimant states further that he is the owner of four several vouchers in duplicate, issued to him by W. E. Chandler in his capacity as Secretary of the Navy of the United States, of which copies are hereto annexed, namely:

One voucher for the sum of five hundred and two and $\frac{75}{100}$ dollars, dated December 3, 1883.

One voucher for the sum of one hundred and fifty-five dollars, dated January 4, 1884.

One voucher for the sum of one hundred and fifty-five dollars, dated February 4, 1884.

One voucher for the sum of twelve hundred and forty-nine and $\frac{31}{100}$ dollars, dated February 4, 1884.

Amounting in all to two thousand and sixty-two and $\frac{6}{100}$ dollars.

Wherefore your petitioner prays that the sum of one hundred and sixty thousand five hundred and three and $\frac{75}{100}$ dollars may be

found to be due to him, and that judgment therefor may be rendered against the United States.

And your petitioner states further that no assignment has been made of said claims or of any part of either of them.

A. B. MULLETT.

DISTRICT OF COLUMBIA, *ss:*

Before me personally appeared Alfred B. Mullett, the above-named petitioner, and made oath that the matters averred on his own personal knowledge in the foregoing petition are true, and that those stated upon information and belief he believes to be true.

A. B. MULLETT.

Subscribed & sworn to May 4, 1889.

[SEAL.] GEO. W. BAGGE,
Notary Public.

GEO. S. BOUTWELL,
Attorney for Claimant.

3 EXHIBITS TO PETITION.

F. H. S.; J. E. D. SECRETARY'S OFFICE,
NAVY DEPARTMENT.

Press copied.

The U. S. Navy Department to A. B. Mullett, Dr.

	For services as member of commission on navy yards, authorized by act of Congress approved Aug. 5, '82, from Sept. 10th to Oct. 9th, '83, at $4,000 per annum	$326 00
Original.	Travelling expenses to Boston under orders of 16th Nov., 1883	26 75
	Expenses for 30 days (Nov.), at $5.00 p. d.	150 00
		$502 75

Approved in duplicate for five hundred and two dollars and seventy-five cents, payable by Pay Director Thos. H. Looker, at Washington, from the appropriation for navy yards commission.

Navy Dept., Dec. 3, 1883.

W. E. CHANDLER,
Secretary of Navy.

Received, —— —, 188–, of Pay— ——, —— dollars and — cents in full for the above.

A. B. MULLETT.

(Copy.)

4 SECRETARY'S OFFICE, NAVY DEPARTMENT.

Press copied.

The U. S. Navy Department to A. B. Mullett, Dr.

Original.	For expenses as member of commission on navy yards, authorized by act of Congress approved Aug. 5, '82, from 1st to 31st of Jan'y, 1884, inc., 31 days, at $5.00 p. d.	$155 00
		$155 00

Approved in duplicate for one hundred and fifty-five dollars and — cents, payable by Pay Direct. Thos. H. Looker, U. S. N., at Washington, from the appropriation for contingent navy, 1884.

Navy Department, Febr'y 4, 1884.

W. E. CHANDLER,
Secretary of the Navy.

Received, ——— —, 188–, of Pay— ——, —— dollars and — cents in full for the above.

A. B. MULLETT.

(Copy.)

5 W. M. SECRETARY'S OFFICE,
NAVY DEPARTMENT.

Press copied.

The U. S. Navy Department to A. B. Mullett, Dr.

Original.	For services rendered as member of commission on navy yards, authorized by act of Congress approved Aug. 5, '82, from Oct. 10, 1883, to Jan. 31st, 1884, both days inclusive, at $4,000 per annum	$1,249 31
		$1,249 31

Approved in duplicate for twelve hundred and forty-nine dollars and thirty-one cents, payable by Pay Dir. Thos. H. Looker, at Washington, from the appropriation for navy yards commission.

Navy Department, Feb'ry 4, 1884.

W. E. CHANDLER,
Secretary of the Navy.

Received, ——— —, 188–, of Pay— ——, —— dollars and — cents in full for the above.

A. B. MULLETT.

(Copy.)

6 J. W. H. SECRETARY'S OFFICE,
NAVY DEPARTMENT.

Press copied.

The U. S. Navy Department to A. B. Mullett, Dr.

Original.	For expenses as member of commission on navy yards, authorized by act of Congress approved August 5th, 1882, from 1st to 31st of December, 31 days at $5.00 per day	$155 00
		$155 00

Approved in duplicate for one hundred and fifty dollars and — cents, payable by Pay Director Thos. H. Looker, at Washington, from the appropriation for contingent navy, 1884.

Navy Department, January 4th, 1884.

W. E. CHANDLER,
Secretary of the Navy.

Received, —— —, 188–, of Pay— ——, —— dollars and — cents in full for the above.

A. B. MULLETT.

(Copy.)

7 II.—*Traverse. Filed May* 17, 1889.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

ROBERT A. HOWARD,
Ass't Att'y General.

8 III.—*Special Plea Filed by Defendants in Bar to First Count in Petition January* 8, 1890.

Now comes the defendant, by the Attorney General, and by leave of the court first had and obtained for a further plea says *actio non*, etc., as to the first count of the petition, because that before the commencement of this suit the plaintiff filed a petition in this court against the defendant, under the provisions of an act of Congress commonly called the "Bowman act," in a claim or matter referred to this court at the request of said plaintiff by the Committee on

Claims of the House of Representatives of the United States Congress, in which last-mentioned petition the said claimant prays this court to investigate the said claims or matter and find the facts thereof and to render a judgment thereon against the said defendant, and which aforesaid claim or matter is the same identical cause of action in the said first count of the petition in this suit mentioned, as by the record and proceedings of the said court on the said claim or matter fully appears, and the parties in said proceedings and petition therein are the same parties in this suit, and the said proceedings are still depending in this court; and this the said defendant is ready to verify by the record.

Wherefore defendant prays judgment if the plaintiff ought to have and maintain his aforesaid suit against the defendant, etc.

W. H. H. MILLER,
Attorney General.

9 IV.—*Special Plea Filed by Defendants in Bar to Second Count in Petition Jan'y* 8, 1890.

Now comes the defendant, by the Attorney General, and by leave of the court first had and obtained for a further plea says *actio non*, etc., as to the second count of the petition, because that the plaintiff before this suit brought an action in this court for the same identical claims mentioned in said count, and thereupon such proceedings were had that afterwards and before this suit it was considered by the judgment of this court that the plaintiff should take nothing by his petition in said action, as by the record of this court fully appears, and which said judgment is stili in force; and this the said defendant is ready to verify by the said record.

Wherefore defendant prays judgment if the plaintiff ought to have and maintain his aforesaid suit against the defendant, etc.

W. H. H. MILLER,
Attorney General.

10 V.—*Motion of Claimant to Amend Petition and Allowance of Same. Filed Jan'y* 9, 1890.

And now comes the petitioner, by his counsel, and moves to amend his petition in the above-named case by striking out the second count in said petition, and also the last paragraph but one of said petition by striking out the words sixty thousand five hundred and three and $\frac{73}{100}$ and inserting the words fifty-eight thousand four hundred and forty-one and $\frac{67}{100}$.

GEO. S. BOUTWELL,
Att'y for Claimant.

Jan'y 9, 1890.

AT CHAMBERS.

Allowed.

WILLIAM A. RICHARDSON,
Chief Justice.

11 VI.—*Argument and Submission of Case.*

At a Court of Claims held in the city of Washington on the second of April, A. D. 1890.

This case was argued by Mr. Boutwell, for the claimant, and by Mr. Brannigan, for defendant, and submitted.

12 VII.—*Findings of Fact and Conclusion of Law. Filed June 2, 1890.*

This case having been heard by the Court of Claims, the court, upon the evidence, find the facts to be as follows:

I.

The commission authorized by the resolution of December 14, 1869, and of which plaintiff, then supervising architect of the Treasury, was a member, decided to erect a building for the Department of State upon McPherson Square, in the city of Washington. It was suggested that plaintiff prepare plans for the building proposed, but he declined, and tentative plans were prepared by another. These plans were not satisfactory. Plaintiff thereupon, at the suggestion of the Assistant Secretary of State, prepared tentative plans for the building then intended to be erected upon McPherson Square for the Department of State only.

Later it was decided to erect at the corner of Pennsylvania avenue and Seventeenth street, Washington, a building to accommodate the Departments of State, War, and Navy, and the McPherson Square site for the Department of State was abandoned. This course was authorized by the act of March 3, 1871, and prior to the passage of this act plaintiff was requested by the Secretary of State to extend his former design so it would cover the larger building then contemplated. This he did.

II.

After the passage of the act of March 3, 1871 (Stat. L., vol. 16, p. 494), the commissioners therein named selected the plaintiff as architect to design and prepare the drawings for the building contemplated by that act. Plaintiff designed these drawings, superintended their preparation, made and suggested changes therein, and the drawings so designed by him were accepted and approved by the commissioners designated in the said act, and the building now occupied by the Departments of State, of War, and of the Navy was built in substantial accordance with the drawings. Plaintiff superintended the construction of the southern wing of this building, now occupied by the Department of State, and the east wing from the beginning, until January 1, 1875, at which date the expenditures upon the building amounted to $3,876,096.47. The total cost of the entire building was $10,030,028.99.

13 III.

Plaintiff during all the time covered by the service hereinbefore described was supervising architect of the Treasury Department. The labor performed by him as to the new building was done by permission of the Secretary of the Treasury, without sacrifice of time properly to be devoted to the duties of the supervising architect and without promise of compensation, except as hereinafter shown. Plaintiff was not at personal expense or outlay in the preparation of plans or otherwise in connection with the new building, but he gave to it his individual genius and individual labor, and this without injury to the interests committed to his charge as supervising architect.

IV.

Plaintiff resigned his office as supervising architect of the Treasury. This resignation took effect January 1, 1875. He was requested by the Secretary of State to remain in charge of the new building at a salary of $5,000 a year, giving to it his entire time and attention. This he declined.

V.

Prior to the passage of the act authorizing the construction of the building plaintiff was told at a meeting where were present the Secretary of State and representatives of the Committees on Public Buildings and Grounds of the Senate and House of Representatives that if he would make the plans they had no doubt that his services would be taken into consideration by Congress in making the necessary appropriations for the erection of the building, and that if his plans were accepted and he should superintend the construction of the building that he would be properly compensated.

VI.

The building for the Departments of State, War, and of the Navy was begun June 21, 1871, and finished in 1888. It does not appear that prior to the commencement of this action plaintiff made a demand for compensation as architect or superintendent of said building, except in an application to Congress.

VII.

The usual and customary schedule of charges of the professional practice of architects, as prescribed by the American Institute of Architects (chartered under the laws of the State of New York), the Western Association of Architects, and other architectural societies, including the District of Columbia, and by — profession generally, fixes the rates of compensation and rules governing the same as follows:

For professional services (including supervision), 5 per cent. upon the cost of the work.

The charge for partial service is as follows:

	Per cent.
Preliminary studies	1
Preliminary studies, general drawings, and specifications	2½
Preliminary studies, general drawings, specifications, and details	3½

14 For works that cost less than $10,000, or for monuments and decorative works and designs for furniture, a special rate in excess of above.

An additional charge to be made for alterations or additions in contracts or plans, which will be valued in proportion to the additional time and service employed.

Necessary traveling expenses to be paid by the client.

The architect's payments are successively due as the work is completed in the order of the above classifications.

Until an actual estimate is received the charges are based upon the proposed cost of the work, and the payments are received as instalments of the entire fee, which is based upon the actual cost.

These are the rates and rules established by the custom and usage of the profession, and are never deviated from by architects in good standing, except under exceptional circumstances, and then only by a special and express contract.

The plans under which the building for the State, War, and Navy Departments was constructed were designed and intended for a monumental building within the meaning of the paragraph of the foregoing schedule, which prescribes additional rates for such plans.

In a number of cases the executive branch of the Government has employed architects at the rates prescribed by the foregoing schedule of the American Institute.

Conclusion of law.

Upon the foregoing facts the court find as conclusion of law that the petition be dismissed.

VIII.—*Opinion of the Court.*

DAVIS, *J.*, delivered the opinion of the court:

The plan upon which was constructed the building now occupied by the Departments of State, of War, and of the Navy was designed by the plaintiff herein. At the time of passage of the act authorizing the building plaintiff was supervising architect of the Treasury, and, being consulted by the commission provided for in that act, he submitted plans satisfactory to them, which were adopted, which, at the commissioners' request, he perfected, and in accordance with which the building was built. At the request of the commission plaintiff superintended the construction of the building until 1875, when, severing his connection with the Treasury, he ceased to have further responsibility as to the new building, although requested to continue as superintendent of construction at a salary, a request which he declined.

We shall proceed directly to consider the defense based upon the

statute of limitations, assuming (for the sake of argument only) that the relations of the parties were such as to create an implied contract by which defendants were under obligation to compensate plaintiff for his genius and labor in the production of a design and in the superintendence of the construction. If such a contract existed, when did the right arise to sue thereon for a breach of the agreement? Manifestly not later than the date when plaintiff severed all relation with the work, and that was upon the 1st day of January, 1875. At that time he ceased to be supervising architect and ceased to superintend the new building, although he was asked to continue — do so and promised payment therefor from that time on, a promise which had not been made to him when he was a Government officer. Upon January 1, 1875, therefore, plaintiff could have begun an action for any compensation as architect, had such compensation been refused, unless there is in the case some peculiar element presenting an exception to the general rule.

It is urged by the plaintiff that such an exception is here presented in this: That the measure of his recovery is to be found in the rules of the Institute of Architects; that under those rules he could not compute his fee until the building was entirely finished, which was in 1888, and therefore his petition is in time.

The clauses upon which the plaintiff relies as relieving him from the bar of the statute of limitations provide:

Until actual estimate is received, the charges are based upon the proposed cost of the works and the payments are received as installments of the entire fee, which is based upon the actual cost. The architect bases his professional charge upon the entire cost to the owner of the building, when completed, including all the fixtures necessary to render it fit for occupation, etc.

It does not appear that prior to the filing of the petition herein plaintiff asked any compensation for his services, although he must have made estimates of the cost of the building. It is urged, however, that, as an architect's fee is based on the cost and the actual cost cannot be fixed until the building is completed, the cause of action does not arise until that date. This rule would be most unjust to architects if applied in the case of the cathedral at Cologne, which was finished within this decade and begun so long ago that all certainty as to the name of the architect is lost, and would work hardship upon the architect of an obelisk like the Washington Monument, which was thirty-seven years growing from corner to capstone. But if the rule bears the interpretation sought to be placed upon it, still does it form the standard upon which any liability on defendants' part is to be measured? The rules of architects are made for those in private life; for architects who have a running expense of office rent, of draughtsmen, and of clerks and stationery, and who are subject to competitive contests. They are made for men engaged in the active struggle and violent competition of business life; for men who have only a percentage of success, whose plans prepared at personal outlay are often declined in favor of those made

by their rivals; in short, for men who take the risks of the profession.

On the other hand, the plaintiff was a salaried officer of the Government, not engaged in competition with his brethren in the art. He ran no financial risks, he paid no office rent, his stationery and his draughtsmen were the Government's. Plaintiff gave the product of his mind and his personal endeavor, but that is not sufficient to bring him within the reason of the prices fixed by the Architects' Institute. Those rates can justly be held to apply only to architects unsalaried by their employer, who give something more than their personal equation to the result accomplished. The rules do not apply to a case like the one at bar. Plaintiff, then, is not entitled to any exceptions which their clauses, if they governed the case, might give him. He severed his relations with the Government January 1, 1875; this action was begun May 4, 1889, and is barred by the statute of limitations.

16 IX.—*Judgment of the Court.*

ALFRED B. MULLETT
v. } 16622.
THE UNITED STATES.

At a Court of Claims held in the city of Washington on the second day of June, 1890, judgment was ordered to be entered in this cause as follows:

The court, on due consideration of the premises, find for the defendants and do order, adjudge, and decree that the petition of the claimant, Alfred B. Mullett, be dismissed.

By the court.

17 XI.—*Application for and Allowance of Appeal.*

And now comes the claimant, by his attorney, and moves the court to allow an appeal to the Supreme Court of the United States in the above-named cause from the judgment rendered in this court June 2, 1890.

GEO. S. BOUTWELL,
Att'y for Claimant.

Filed and allowed in open court June 3, 1890.

WILLIAM A. RICHARDSON,
Chief Justice.

18 In the Court of Claims.

ALFRED B. MULLETT
v. } 16622.
THE UNITED STATES.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the plead-

ings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application for and the allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington city, this 14th day of June, A. D. 1890.

JOHN RANDOLPH,
Ass't Clerk C't of Claims.

Endorsed on cover: Court of Claims. No. 1194. P. Pearl Mullett, administratrix of Alfred B. Mullett, deceased, appellant, *vs.* The United States. Filed June 18, 1890.

Office Supreme Court U. S.
FILED.
OCT 20 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

P. PEARL MULLETT, ADMINISTRATRIX OF ALFRED B. MULLETT, DECEASED, APPELLANT,

v.

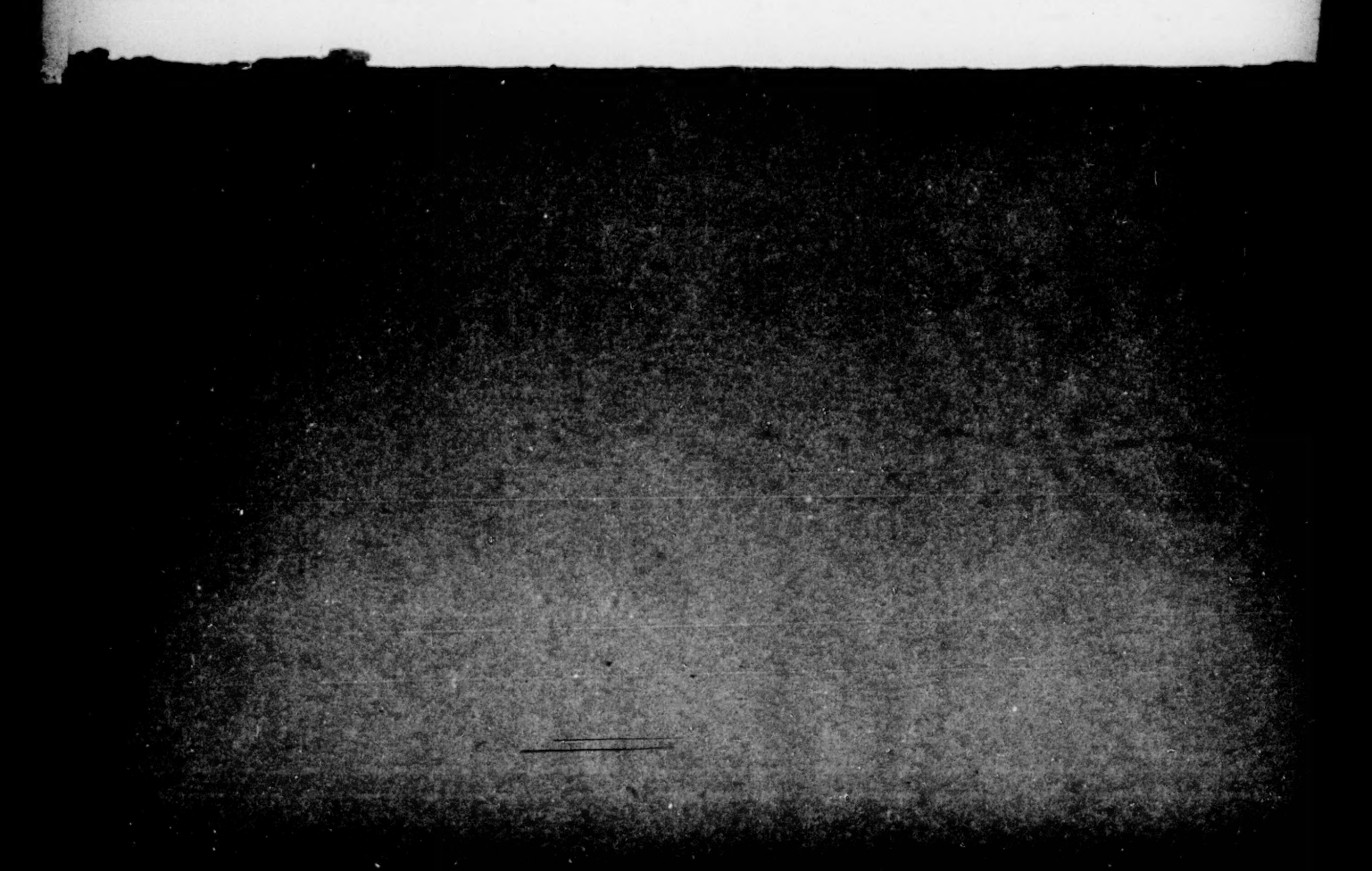
THE UNITED STATES.

No. 121.

BRIEF FOR APPELLANT.

GEO. S. BOUTWELL,
Attorney for the Appellant.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1893.



Supreme Court of the United States.

OCTOBER TERM, 1893.

P. PEARL MULLETT, ADMINISTRATRIX OF ALFRED B. MULLETT, DECEASED, APPELLANT,
v.
THE UNITED STATES.
No. 121.

Brief for Appellant.

STATEMENT.

This case is before this Court upon appeal from the Court of Claims, made on behalf of the then claimant, Alfred B. Mullett.

In his petition Mr. Mullett stated that he was "by profession an architect and civil engineer," and "that in his professional capacity as an architect he was, in the year 1871, employed by the Secretary of State, Secretary of War, and Secretary of the Navy, a Commission created by authority of Congress (16 Statutes-at-Large, p. 494) to submit designs for the proposed new building for the State, War, and Navy Departments, and that accordingly

the claimant prepared such designs, which were accepted by the Commission aforesaid.

"Thereupon the aforesaid Commission directed your petitioner to prepare working drawings for the construction of the said building, which drawings were accordingly prepared by your petitioner and accepted by the aforesaid Commission, and which were thereafter followed throughout in the construction of said building.

"The claimant was also, by the direction of the said Commission, charged with the superintendence of the erection of the aforesaid building, and that service was performed by him from about January 1, 1870, until January 1, 1875."

These averments were all sustained by the Court of Claims in the findings of fact.

Findings of Fact I, II, III, IV, Record, pp. 6, 7.

The following finding was also made by the Court, viz:

"Prior to the passage of the act authorizing the construction of the building plaintiff was told at a meeting where were present the Secretary of State and representatives of the Committees on Public Buildings and Grounds of the Senate and House of Representatives, that if he would make the plans they had no doubt that his services would be taken into consideration by Congress in making the necessary appropriations for the erection of the building, and that if his plans were accepted and he should superintend the construction of the building he would be properly compensated."

Finding V, Record, p. 7.

It was contended at the hearing that the proofs justified the legal conclusion that there was an implied contract between the properly constituted agents of the Government and Mr. Mullett that he should be compensated for

his designs and plans of the State Department and for his services as superintendent of construction.

This contention was not passed upon definitely by the Court of Claims, and the only reference to it is in this sentence: "We shall pass directly to consider the defence based upon the statute of limitations, assuming (for the sake of argument only) that the relations of the parties were such as to create an implied contract by which defendants were under obligations to compensate plaintiff for his genius and labor in the production of a design and in the superintendence of the construction." (Record, pp. 8, 9.)

The Court then proceeded to consider the validity of the plea of the defendant that the claim was barred by the statute of limitations. The Court sustained the plea and the petition was dismissed. In behalf of the appellant it is claimed that this was error.

Argument.

The questions before this Court appear to be these:

(1) Do the facts as found by the Court of Claims require this Court to find as a conclusion of law that a contract existed between Mullett and the duly constituted agents of the Government, by which Mullett was to be compensated "for his genius and labor in the production of a design and in the superintendence of the construction" of the building known as the State Department?

(2) And, if such a contract existed, is the claimant barred by the statute of limitations?

The claimant's services as superintendant of construction terminated January 1, 1875. (Finding IV.)

His petition was filed in the Court of Claims May 4, 1889. (Record, p. 1.)

It is admitted that the statute was well pleaded as to so much of the petitioner's claim as relates to his service as superintendent of the work.

The claim for the design of the building rests upon different grounds and is maintainable against the plea of the statute for other and sufficient reasons apparently.

The seventh finding of fact is to the effect that the architects of the country have fixed and uniform rates of compensation and that in all cases the aggregate compensation for designs, plans, and drawings depends upon the cost of the structure, and is ascertainable only upon the completion of the structure.

It appears from the same finding that the Government has recognized the propriety of these rates and has been governed by them in the compensation paid to architects of other public buildings.

Additional or extra charges are made for designs and plans of decoration and monumental works, and the Court find that "the plans under which the building for the State, War, and Navy Departments was constructed were designed and intended for a monumental building within the meaning of the paragraph of the foregoing schedule, which prescribes additional rates for such plans." (Finding VII, p. 8.)

Without following the argument of the Court in the opinion rendered, it is just to say that the Court held that the rules of the society of architects did not apply to Mr. Mullet, yet not upon the ground that he was not an architect, but for the reasons that he was then a salaried officer of the Government, and that in the work of designing the State Department building he was not subject to the competition of other artists; that he was not required in the course of business to make competitive plans, for which, in case of failure, he would receive no

compensation, and that he was free of rents and other expenses incident to the prosecution of the business. The point made that Mullett was a salaried officer of the Government is controlled by the third finding of the Court, wherein it is said, the labor performed by him as to the new building was done by permission of the Secretary of the Treasury without sacrifice of the time properly to be devoted to the duties of the Supervising Architect. All else may have been true, but it is to be observed that these facts or considerations do not disturb the reason for the rule, nor do they lead, properly, to any doubt as to the justice of applying the rule to the claim of Mr. Mullett. They do not touch the rule or method of computing the compensation, although, as is admitted, they do affect, qualify, and diminish the amount of compensation to be allowed.

The value of the works of genius, of art, of the creative, of the inventive powers of men, cannot be measured and determined by the enumeration of the days and hours employed in their production. A monumental building is a work of art, and architects who design and create such buildings are artists, and when success waits upon such an undertaking the successful artist is thereafter ranked with men of genius. It would be absurd and the height of injustice to require such a man to render an account of his time and measure his compensation thereon.

This is, however, in effect what the Court of Claims has done. Its opinion rests, apparently, upon the assumption that in 1872, or in 1874, or within six years thereafter, Mr. Mullett should have made a demand for compensation, either for the time employed in preparing the designs, or else upon an estimated cost of the building, of which neither he nor the officers of the Government, nor the Court of Claims could have had any trustworthy foreknowledge.

The rule of the society of architects is not a perfect rule. In its application it may yield excessive compensation in some cases and it may give inadequate compensation in others, but it has a basis in reason, and it is justified by experience. It recognizes the fact that the value of the labor, talent, and genius required in any given case is proportionate to the character or quality of the monument or edifice that is to be produced, and that the character and quality of the monument or edifice have a direct relation to its cost. Hence the allowance to the designer of a per cent. on the cost of a structure is an approximation to a just compensation for his services, and it may be difficult to suggest a general rule for which a more satisfactory reason can be given or which would prove more just in its operation.

The rules of the society of architects have been in existence for many years. They have been observed by the members of the profession; they have been recognized by the public generally in the compensation paid for designs, plans, and drawings, and for superintendence of construction, and it is difficult to assign a satisfactory reason for any modification of these rules by the courts.

In the case of Smithmeyer against the United States (147 U. S. 342), the validity of the architects' schedule appears to have been recognized by the Court of Claims, and by this Court in affirming the decision of the Court of Claims. In that case the Court found that the claimants had been employed professionally upon the building by the Government at stated salaries, and the Court said, "the acceptance of employment at an agreed compensation per annum, before either party had acted on the faith of a different understanding, leaves no room for implying any other contract or usage" (p. 359).

Finally, the argument of the attorney for the claimant in this case is directed to these points:

(1) That there was an implied contract between Mullett and the duly constituted agents of the United States by which he was to be compensated for his labor and genius in preparing designs for the State, War, and Navy building.

(2) That compensation is to be made upon the rule of the society of architects.

(3) That the right of action arose when the building was completed.

(4) That if the statute is a bar to any part of the claim the operation of the bar is limited to so much of the claim as accrued six years and more prior to the filing of the petition.

GEO. S. BOUTWELL,
Attorney for the Appellant.

OCTOBER, 1893.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

P. PEARL MULLETT, ADMINISTRATRIX of Alfred B. Mullett, deceased,
v.
THE UNITED STATES.
} No. 121.

BRIEF FOR DEFENDANTS.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

P. PEARL MULLETT, ADMINISTRATRIX of Alfred B. Mullett, deceased,
v.
THE UNITED STATES.
No. 121.

BRIEF FOR DEFENDANTS.

The claim in this case is for compensation as an architect, and at the rate and upon the terms adopted by the architects' association in the country, that is, at the rate of 1 per cent on the total cost of the building for making preliminary studies, upon a contract claimed to be implied from the following transactions:

On December 14, 1869, Congress adopted a resolution (16 Stat. L., 367) appointing a commission, to consist of the Secretary of State, the Secretary of the Treasury, the Secretary of War, the Architect of the Capitol Extension, the Supervising Architect of the Treasury (the claimant), and the Superintendent of Public Buildings and Grounds, to select a site for the erection of a new building for the State Department, and to cause plans to be made for the same, with an estimate of the probable cost.

The claimant's decedent was then Supervising Architect of the Treasury Department, receiving salary as such. That commission first approved of McPherson Square as a location, and, after examining and disapproving plans presented by other arthitects, the claimant's decedent, a member of the commission by name and virtue of his office, at the suggestion of the Assistant Secretary of State, prepared plans for a building suited to that location. Later the commission decided on the present location for the building, and that it should be increased in size, so as to accommodate the Departments of War and Navy in addition, and the claimant, at the request of the Secretary of State, extended and enlarged his former design to meet the ideas of the commission as to the larger building.

Thereafter on March 3, 1871, an appropriation was made (16 Stat. at L., 494), appropriating $500,000 for the construction under the direction of the Secretary of State of the south wing of the building upon the present site. Such buildings to be similar in ground plans and dimension to the existing Treasury building, and to provide accommodation for the State, War and Navy Departments, with various other specifications, the plans to be approved by the Secretary of State, the Secretary of War, and the Secretary of the Navy, before any money should be expended.

These three officers, in pursuance of that act, adopted the plans previously prepared by the claimant's decedent, and requested him to elaborate them into details and working drawings for such building. This the claimant's decedent caused to be done by the Government clerks

under him while occupying the office of Supervising Architect and drawing salary therefor. He acted also as superintendent of construction, suggesting and making changes in the plans and drawings from time to time, continuing in such work until January 1, 1875, when he resigned his office as Supervising Architect of the Treasury, was requested by the Secretary of State to take the position of superintendent of construction of the new building at the salary of $5,000 a year, giving to it his entire time and attention, which he declined. Counsel now concedes that the services in superintending are barred by limitation.

While claimant's decedent performed the services above mentioned, he also performed his other necessary duties as Supervising Architect, and was at no personal expense or outlay in the preparation of plans or otherwise in connection with this building. At some time *prior* to the passage of the act of March 3, 1871, the Secretary of State told the claimant's decedent that he had no doubt his services would be taken into consideration by Congress in making the necessary appropriation for the erection of the building, and that office plans were inspected and he should superintend the construction of the building, he would be properly compensated.

Upon this state of facts the claimant insists that an implied contract arose to pay her decedent according to the custom of architects, 1 per cent on the total cost of the building for the preliminary studies, conceding that he had no claim to the 2½ per cent charged by architects for "general drawings, specifications and details," for the reason that such work was performed by Government

clerks in decedent's office; and also conceding that the claim for 1½ per cent for superintending construction is barred by the statute of limitations.

I.

It is insisted on behalf of the defendant that no such implied contract to pay arose upon these transactions.

The services were performed by Mullett by reason of requirement of Congressional resolution imposing upon him as Supervising Architect, in conjunction with certain other public officers, certain duties, inclusive of causing plans and estimates to be made. (Res. Dec. 14, 1869, 76 St. L., 367.) No compensation was provided for the members of this commission, all of whom were in receipt of their various official salaries.

These services consisted, first, in preparation of plans for a small building adequate to the needs of the State Department and adapted to McPherson square, and, later, in preparation of enlarged and modified plans suited to the present site and embracing a tri-departmental building, such as finally authorized by Congress. This was all done by him while a member of that commission and before the act of Congress authorizing the building and making appropriation therefor. (Finding I, page 6, R.)

It is perfectly clear that as to these services no contract can be implied to pay extra compensation. Mullett was employed by the Government as an architect, the services in question were in the line of his profession, and not excluded from his official duties by any limitation placed on these duties either by law or by departmental rules.

It is to be observed that the duties of Supervising Architect are nowhere defined. He was the Government's architect, and the only one whose permanent employment was provided for, except those employed for special work. Plans for all Government buildings come under the supervision of the Treasury Department, section 3774, Revised Statutes. No limitation of his duties is to be assumed from the fact that he is classed with Treasury Department employés.

By virtue of the position and salary enjoyed by him the Government was entitled to his genius, skill, and labor in the line of his profession, and neither statute or regulation had drawn a line, nor authorized the architect to draw one, which should separate and parcel out on the one hand the portion of his genius and skill which was compensated by his salary, and on the other that portion for which, whenever drawn on, the Government was presumed to pay for in percentages.

Nothing could be more subversive of loyalty and good faith in public service than the idea that the Government is entitled to only a portion of the ability or skill of its officers, and no such limitation should be or ever has been recognized.

As to the services performed by Mullett while a member of the commission created by the resolution of December, 1869, which are the only services for which any claim is here pressed, he occupied exactly the same position as his co-commissioners.

His claim for commissions as an architect is just as absurd as would have been a claim by the Secretary of the

Treasury or the Secretary of State for the ordinary commissions charged by real-estate agents for selecting and negotiating terms of purchase of a site afterward adopted.

His services on this commission were imposed upon his office and no provision or appropriation for extra pay therefor was made; he therefore falls clearly and distinctly within the prohibitions of sections 1763, 1764, and 1765 of Revised Statutes.

The personal services which are the basis of the claim appear to have been performed prior to the act of March 3, 1871, which authorized the erection of the building in question. We deny that the facts found show that there was any contract for those services, and assert that they were purely voluntary. The claimant, recognizing that there was no authority to contract with him before the act of Congress just mentioned, states in his petition that the contract he relies on was made with the commission created by the authority of that act. In his petition and brief, however, he seems desirous of making the contract retroactive and to have it appear that the commission contracted to pay him for services previously voluntarily rendered. Section 3732 of the Revised Statutes, section 3709, and other sections, all then in force, prevented him from venturing to state, in so many words, that the commission did or could have rendered the Government liable for such past services. But he says in his petition, in effect, that the service under the contract was performed from about January 1, 1870, until about January 1, 1875, and he says in his brief that this averment was sustained by the court in the findings of fact. The part of the

services which antedated the law providing for the erection of the building were those about the preliminary studies.

The findings of fact do not, as the claimant says, confirm his requests for findings as to these early services, although his request for a finding that the commission directed him to prepare working drawings for the construction of the building was found, with the exception that the word "directed" was omitted and the word "selected" substituted. These working drawings, as the court will observe, had nothing to do with the services upon the preliminary studies.

As we read the findings, the services upon the preliminary studies were rendered almost wholly at the "suggestion" of the Assistant Secretary of State, and the remainder upon the request of the Secretary of State at a time when the law authorizing the building had not yet yet been passed. It does not appear whether the request of the Secretary of State preceded or followed the conversation mentioned in finding 5, in which something was said about the probability that Congress would take into consideration the claimant's services in making the necessary appropriations for the erection of the building, a prophecy which the act soon after passed effectually negatived. But it is distinctly found that the services were performed because the Assistant Secretary of State suggested and the Secretary of State requested that they should be.

This suggestion and request were from persons having no more authority to contract for such services on behalf

of the Government than a private individual, and the very conversation relied on to prove a contract shows that the lack of authority was fully understood on all sides, and that compensation, if desired at all, would have to come from a new law of Congress.

On December 14, 1869, a resolution of Congress was adopted (16 Stat., 367) constituting the Secretary of State, Secretary of Treasury, and the Secretary of War, the architect of the capitol extension, the supervising architect of the Treasury Department, and superintendent of buildings and grounds a commission to select a site for a new State Department; to cause plans to be made for the same, with an estimate of the probable cost thereof; and also to examine as to the propriety of making some arrangements for the War Department, if the then present site of that Department should be regarded as the most suitable for the State Department. It will be observed that the Assistant Secretary of State was no part of this commission. According to the finding of the court, the commission decided to erect a building for the State Department upon McPherson square; it was suggested that the claimant prepare plans for the building proposed; he declined, and tentative plans were prepared by another; these plans were not satisfactory. Plaintiff thereupon, at the suggestion of the Assistant Secretary of State, prepared tentative plans for the building then intended to be erected on McPherson square for the use of the Department of State. This was clearly a voluntary service rendered at the suggestion of an outsider, and prompted either by the claimant's zeal as a member of the commission or by those

motives which prompt artists, of whom the claimant as an architect was one, to conceive and design works likely to be noted and to be monuments of their genius. We can not suppose for a moment that he, as a member of the commission and as supervising architect of the Treasury, was ignorant as to who had and who had not authority to contract for such a service.

It is further found by the court that the commission, as we understand, decided to erect at its present site a building to accommodate the Departments of State, War, and Navy, and the McPherson square site for the Department of State was abandoned. Of course this decision was wholly unauthorized by the resolution appointing the commission, who were merely to report upon plans for the State Department and to suggest some arrangements for the War Department in a certain contingency. We do not mean to say that the commission did not do a very proper thing in going beyond what it was directed to do. On the contrary, it showed the same laudable public spirit in this that was shown by the claimant in making the preliminary studies or tentative plans, as the court calls them. But there was no law authorizing the erection of any building or the making of plans for any building of the kind the commission decided to erect, or rather, as we suppose, to recommend. It was now, or about this time, that the plaintiff was requested by the Secretary of State to extend his former design so it would cover the large building then contemplated. This of course was a comparatively small part of the services, since it was merely to exercise a little ingenuity in adapting the results of his

creative genius to a building of larger size and was like the prior work performed by him while a member of the commission.

This was the end of the services upon the preliminary studies. The authority of the Secretary of State with regard to employing an architect for such building was the same as his own, that is to say, he had none at all. We may add that the authority of the meeting at which were present the Secretary of State and representatives of the Committee on Public Buildings and Grounds of the House of Representatives and the claimant was precisely similar. The claimant is not found to have been, and could not as an intelligent man have been, under the impression that his services, thus rendered, were rendered in consequence of any express or implied promise of payment. It does not appear that he desired, hoped for, or at that time would have accepted payment.

II.

We deny that there was any contract at all with the claimant.

The reasons applicable to transactions between a private architect and a private individual do not exist in this case. The notions connected with dealings with merchants would be misleading in the present case. When a man orders goods from one whose sole business it is to sell goods, and they are delivered accordingly, an intention to buy and sell is the only one that can be supposed. Such an order and delivery are a mere abbreviated expression of the contract. But the architect in this case occupied peculiar

relations with the Government. He was not practicing his profession. He had quitted it to become an official. He was like a retired physician who, in a particular case of sickness, attends the patient. He occupied peculiar relations to the Government in this matter, as a father does toward his son whom he takes into his house or hotel to live without any express contract for board. He was employed generally, without any strictly defined duties, to do what the Government might need in the way of his profession. His time and talents were supposed to be at the disposal of the Government without regard to hours of labor. Every kind of architectural task could be and was from time to time assigned to him. He should have had an express contract, if the Secretary of State would have made one, and not have gone along in silence, sleeping upon his rights, and then after many years come to ask the court for its aid in making out a contract by presumption. This is the law applied to a bank president who devoted all his time, outside of that necessary for his regular duties, to superintending a building for the bank, with the full knowledge and approbation of the directors. (*Pew vs. First National Bank of Gloucester*, 130 Mass., 391.) So in the case of the president of a railroad company, who was authorized by the company to direct the construction of a building, which was no part of his duties as president, the court says: "When plaintiff undertook to perform for the company a service not strictly within the sphere of his duties as president, he should have required a stipulation for remuneration for said service if he expected it from

the company." (*Devisee* v. *Shreveport City Railroad Company*, 27 La. An., 641.) It would lead to curious consequences if it were known that every man learned or skilled in some particular science or art, now become a public official, could bring in a claim for every service not obviously expected of him when he was appointed—if every lawyer connected with the Department of Justice could put in bills for advice and aid to other officials about their duties, if the Surgeon-General and his assistants could render bills for such services in connection with the sanitation of public buildings, and so on. Officials would spend their time largely in computing what the Government owed them; zeal in the service, public spirit, that willingness which should exist among fellow servants, public and private, to coöperate for the employor's benefit, would give place to an unseemly scramble for additional pay; and the time of the courts would be taken up with fine distinctions upon pretended contracts of the most extraordinary kind and from the most unexpected quarters.

III.

We shall suppose, for the present, that there was such a contract, and we say that he ought not to recover at this late day, for this reason: In 1875 he voluntarily, and against the wishes of the other party, abandoned the work upon the building, and so failed to comply with the conditions of the contract. Having done so, he was not in a position to take advantage of any stipulations in the contract. He could not have sued for a breach of it, because

he was the only one who had committed any such breach. He could not have sued upon an *indebitatus assumpsit* upon a promise which the law would have created to pay him what the contract stipulated or required, for it did not stipulate or require anything, except in consideration of, and conditioned upon, performance on his side. Without going into the question as to whether he could have sued upon a *quantum meruit*, supposing the contract to have remained open, it seems to be clear, as a matter of reason and authority, that to the special advantages of the contract he had ceased, by his conduct, to be entitled, and that the most the law would allow him was the benefit of a new, fictitious contract, arising out of the benefit he had conferred, to pay him what his services were reasonably worth. (*McClay* v. *Hedge*, 18 Iowa, 66; *Pixler* v. *Nichols*, 18 Iowa, 106; *Austin* v. *Keating*, 3d West. Rep., 288 (Mo.); *Crump* v. *Rebstock*, 2 West. Rep., 411 (Mo.); *Hayes et al.* v. *Second Baptist Church*, 3 West. Rep. 830.)

How the amount of compensation upon this fictitious contract should be ascertained, whether he would be limited as a maximum by the contract price, whether the rules of architects would be admissible evidence or not, are questions unnecessary to consider.

The materiality of the conclusion that all the claimant was entitled to after abandoning the work was the benefit of the fictitious contract mentioned will be apparent to the court. It follows from it that the claimant could have sued as soon as he abandoned the work, for in this fictitious contract everything had then been executed and was at an end. It also follows that the claimant was never

entitled to a specific per cent of the actual cost of the building, for he was to be entitled to that only as one of the stipulations of the real contract, and the fictitious one is confined to a reasonable compensation in view of all the circumstances.

And from this it follows that this claim and all parts of it could have been presented, ascertained, and paid more than six years before 1889, when suit was brought.

IV.

We deny that the contract entered into with the claimant embraced the rules of architects. It does not appear that the secretary of state, who, alone, under the act for the erection of the building in question, had a right to contract, was aware of any such rules. It is not to be supposed that the community in general are aware of rules adopted by an association for the guidance of its own members in making charges, however those rules may be known to architects and builders. It seems never to have been held in this country that those rules were binding upon an ordinary individual, unless he was acquainted with them in such a way as to be presumed to have employed the architect with them in mind. In the case of *Gilman* v. *Stevens* (54 How. Prac. Rep., 197) and *Mason* v. *The United States* (4 C. Cls. R., 495), the only cases we have yet seen in which the rules are mentioned at all, this seems to have been the view taken of the law. In Lloyd's Treatise on the Law of Building and Buildings, the latest American work on that subject, it is distinctly and twice stated (pp. 11 and 537) that, in this

country where there has been no contract made in view of the rules of architects, the law will exact reasonable compensation rather than enforce the rules of any society or association; that there is no fixed rule as to the compensation of architects in the United States, and where the amount is not stipulated they will be allowed reasonable pay for their services, taking into consideration their professional nature and all attending circumstances. In *Cutts* v. *Pelby* (20 Pick., 65) the court will find an instance of a suit in assumpsit to recover a reasonable compensation for labor and services of an architect in preparing designs and plans for a theater. That these rules, as far as they ascertain the fees which it is reasonable to charge, are valuable guides in the inquiry after a reasonable compensation may or may not be so. But if they do not necessarily enter into every contract in the United States, where nothing is said about the compensation, and bind the employer to pay a specific percentage, whether, in view of the particular circumstances, it is the reasonable value of what has been done, then it follows again that the claimant must have sued within six years from his abandonment of the work, notwithstanding anything in those rules.

V.

We deny, however, the construction which the claimant, to avoid the effect of his long delay, puts upon the rules of architects. He says his right of action did not accrue until the actual cost of the building was known, because, as we understand him, it was upon the actual cost that his

percentage was to be calculated. For example, he claims 1 per cent for preliminary studies, and says the rule required this to be calculated upon the actual cost, and consequently it was impossible for him to demand or sue until that was ascertained.

The language upon which alone he can rely is the following: "Until an actual estimate is received the charges are based upon the proposed cost of the work, and the payments are received as installments of the entire fee, which is based upon the actual cost." It is difficult to see how, without amending this rule, we can say that the total cost has anything whatever to do with the 1 per cent for preliminary studies. The rule says the 1 per cent is to be based on the proposed cost, or upon an estimate. It evidently does not contemplate or provide for the extraordinary case which the claimant's long delay now presents. According to the manifest intention of the rule, which seems to need no interpretation, payment for the preliminary studies was "due" when they were "completed," and if demanded immediately and, therefore, before there had been any estimate, would have been 1 per cent of the proposed cost; if demanded after the making of the estimate, 1 per cent of the estimate. This was evidently in order to enable the architect to anticipate in a definite way the time of payment of the entire fee, which would not vary, whatever the anticipations were, and it was taken for granted that when the entire cost was known either the architect would have been paid long since the installment based on the proposed cost or the estimate, or that installments would have ceased altogether

to be in question and he would get the entire fee. But whatever the reason for the rule of architects, it does not base the 1 per cent for preliminary studies upon the actual cost, and, therefore, the claimant can not rely upon that rule as a reason why his cause of action could not arise until the total cost was ascertained.

VI.

The claimant makes a singular admission in his brief when he says that what the lower court says about the relations of the claimant to the Government, while not disturbing the reason for the rule of architects, nor leading, properly, to any doubt as to the justice of applying the rule to the claim of Mr. Mullett—while not touching the rule or method of computing the compensation, yet "do affect, qualify, and diminish the amount of compensation to be allowed." We are not very clear as to the meaning of these divers qualifications or prefixes attending the admission. One thing, however, seems plain, and that is that if, after waiting from 1871 or 1875 to 1888 to render certain the total cost, in order to learn what 1 per cent of it would be, the claimant must then have had this total cost affected, qualified, and diminished, he would have been as far from certainty as before. Had the question of his suing arisen in 1875, no court would have told him, or heard him tell it, that a suit was premature because the amount of his recovery could not be ascertained until the building was finished and the total cost found, and then duly "affected, qualified, and diminished."

VII.

The findings disclose a classification of architectural services into four steps or elements, as follows: First, preliminary studies, the customary compensation at 1 per cent; second, general drawings and specifications, customary compensation, 1½ per cent; third, details, customary compensation, 1 per cent; fourth, superintending construction, customary compensation, 1½ per cent.

In the petition in this case, as above set forth, the only services claimed are for the first class, namely, preliminary studies, 1 per cent, and superintendency, 1½ per cent. The charge for superintendency being now in this court withdrawn, the bar of the statute of limitations being conceded to affect that.

These services of architects are, of course, chronological in their order. An architect may present preliminary studies, and have no further relation to the work; or he may go a step further, and prepare the general drawings and specifications, and go no further; or he may add the details; and, lastly, he may continue in superintendency. Bearing this classification in mind, it appears that for some reason not apparent in the petition, nor in the findings, the claimant made no claim for the second or third of these steps, such absence of claim being explained in his brief below by the fact that the working drawings, specifications, and details were elaborated by the Government clerks under his direction and in his office.

It is obvious that the only element of the claimant's services as architect for which he now makes claim is the

first, and that that was fully completed while he was a member of the commission under the resolution of December 14, 1869, before the passage of the act of March 3, 1871, making appropriation for this building. (See findings, pp. 1, 2.)

It is further found (R., p. 8) that under the custom of architects, which is here invoked as the basis of an implied contract for the payment of claimant, that "the architect's payments are successively due as his work is completed, in the order of the above classification." That is to say, his only present claim for compensation for the preliminary studies was due and payable upon the contract contended for by him as early as 1871. Of course, all work performed by him was completed, and under these rules the compensation therefor was due and payable prior to 1875, when he withdrew from the matter entirely. This finding seems to entirely conclude the question of the statute of limitations. The fact that the amount might not be absolutely defined at that time, and that if an architect continues in the performance of his services up to the completion of his building he may be entitled to more or less, is met by the further regulation, made by the architects in their own behalf, that for the several steps they shall be compensated on the basis of the proposed or estimated cost of the work.

This claimant, if he had any cause of action at all, clearly had one when he had completed his preliminary studies, and the same were accepted in 1871 by the Secretaries of State, War, and Navy, and he directed to have

the working drawings and details prepared by the Government clerks. He is therefore barred, as the Court of Claims well found. (*McIver* vs. *Ragan*, 2 Wheat., 25.)

Respectfully submitted.

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